PROVINCIAL COURT OF NOVA SCOTIA
Citation: R v. Downey, 2012 NSPC 74

Date: 20120117
Docket: 2353166
Registry: Halifax

Between:

Her Majesty the Queen

v.

Rodan Downey

Judge:	The Honourable Judge Theodore K. Tax
Heard:	December 19 & 21, 2011, in Dartmouth, Nova Scotia
Oral Decision:	January 17, 2012
Written decision:	September 18, 2012
Counsel:	Michelle James, for the Crown Mike Taylor, for the Defence

By the Court:

INTRODUCTION:

[1] Mr. Rodan Downey is charged with several offences on June 27, 2011 and on August 17, 2011, contrary to section 145(3) of the **Criminal Code** for failing to comply with the terms and conditions of a Recognizance which he entered into before a Judge on August 12, 2009. Mr. Downey is also charged with an offence contrary to section 264(2)(c) of the **Criminal Code** that he knew Chelsey Owen was harassed or by being reckless as to whether Ms. Chelsey Owen was harassed, did, without lawful authority, beset or watch the place of work of Ms. Owen at 159 Main Street, Dartmouth, Nova Scotia, between June 1, 2011 and August 18, 2011, and thereby caused Ms. Owen to reasonably fear for her safety.

[2] The Crown proceeded by indictment on all of the charges and Mr. Downey elected to have his trial in the Provincial Court. The Crown called five witnesses and presented video surveillance from the Tim Horton's restaurant at 159 Main Street in Dartmouth, Nova Scotia, which was recorded on the morning of June 27, 2011. The Defence elected not to call any witnesses.

[3] The issue is whether the Crown established, beyond a reasonable doubt, that Mr. Downey's visits to the Tim Horton's restaurant at 159 Main Street, in Dartmouth, Nova Scotia, between June 1 and August 18, 2011, satisfied all of the essential elements of a criminal harassment charge contrary to section 264(2)(c) of the **Criminal Code** and whether he had breached the terms of his Recognizance by having direct or indirect contact or communication with Ms. Owen on June 27, 2011 and on August 17, 2011, contrary to section 145(3) of the **Code**.

The decision was reserved until today's date.

SUBMISSIONS OF COUNSEL:

[4] It is the position of the Crown that uncontradicted evidence established that Mr. Downey had breached the terms of his Recognizance of August 12, 2009, by having a cell phone in his possession and by failing to comply, without a lawful excuse, with the terms of the house arrest condition in that Recognizance on both June 27, 2011 and also on August 17, 2011. The Crown also submits that on June 27, 2011, when Mr. Downey entered the restaurant, that visit constituted direct or

indirect contact or communication with Ms. Owen contrary to section 145(3) of the **Code**. Finally, the Crown conceded that on August 17, 2011, there was no evidence of any contact or communication by Mr. Downey with Ms. Owen contrary to section 145(3) of the **Code**.

[5] In terms of the criminal harassment charge contrary to section 264(2)(c) of the **Code**, the Crown submits that all of the essential elements for this charge were established through Mr. Downey's four visits to the Tim Horton's restaurant at 159 Main Street, in Dartmouth, during the month of June and on August 17, 2011. It is the position of the Crown that those four visits to the Tim's Horton's location where Ms. Owen worked, caused her to fear for her safety and that her fear was reasonable in all of the circumstances.

[6] It is the position of the Defence that the Crown did not establish all of the essential elements of the criminal harassment charge contrary to section 264(2)(c) of the **Criminal Code** beyond a reasonable doubt. Moreover, Defence Counsel submits that there is no evidence before the court that Mr. Downey knew who Ms. Owen was or that she worked at that particular Tim Horton's location. It is also the

position of the Defence that Mr. Downey did not knowingly have any direct or indirect contact or communication with Ms. Owen.

[7] Defence Counsel acknowledges that Mr. Downey went to the Tim Horton's restaurant at 159 Main Street, in Dartmouth, on June 27, 2011 and on August 17, 2011. Counsel concedes that, on those two dates, the evidence established that Mr. Downey violated the conditions in the Recognizance of August 12, 2009, which prohibited him from using or having a cell phone in his possession and required him to remain in his residence at all times under house arrest, unless specifically excepted. The Defence concedes that none of the exceptions to the house arrest condition were applicable on either June 27, 2011 or August 17, 2011.

TRIAL EVIDENCE:

[8] Ms. Chelsey Owen stated that she has worked for over two years as an employee at the Tim Horton's "drive through" restaurant at 159 Main Street, in Dartmouth, Nova Scotia. She testified that she knew Mr. Rodan Downey as she had attended at his court appearances on several prior occasions in relation to charges stemming from an incident which had occurred about two years earlier

and involved her being abducted by a group of men. Mr. Rodan Downey was one of the people charged in relation to that incident and his charges remain before the courts. Ms. Owen has recently testified during a preliminary inquiry relating to the outstanding charges against Mr. Rodan Downey.

[9] During June, 2011, Ms. Owen estimated that Mr. Downey visited the Tim Horton's restaurant where she worked on three occasions. On the first two occasions, he was a passenger in the vehicle that proceeded through the side of the restaurant which served the passenger-side of a vehicle. On each of those two occasions, Ms. Owen was working with a colleague serving the passenger- side drive through window of the restaurant.

[10] On the first occasion that Mr. Downey proceeded through the drive-thru, Ms. Owen took his order and served it to him. He never said anything to her and she never said anything to him. As the car came up to the service window, Ms. Owen saw Mr. Downey in the car. She handed him his order, gave him his change and then put her head down and walked away from the window. On this first occasion, she stated that she felt "intimidated" and "very uncomfortable." Ms. Owen stated that essentially the same thing happened a week or two later when

Mr. Downey again came through the passenger side drive-through lane in a car being driven by another individual.

[11] On June 27, 2011, Mr. Downey walked into the Tim Horton's restaurant at 159 Main Street in Dartmouth. Ms. Owen stated that she had recognized him from his two earlier visits in a car and from his court appearances in relation to the outstanding charges. As Mr. Downey entered the restaurant, she immediately left the front counter area and went back to an office. She told her manager why she had left the front counter area and that she had been advised to call the police if Mr. Downey came to the restaurant. She watched Mr. Downey on the surveillance camera, and once Mr. Downey left the restaurant, she called the police. Ms. Owen estimated that Mr. Downey was in the restaurant for about 10 to 15 minutes.

[12] After Mr. Downey left the restaurant, Ms. Owen returned to her work location at the front of the restaurant. She saw Mr. Downey standing by the curb of the restaurant driveway and she stated that they made a brief eye contact with each other. This visit to the restaurant by Mr. Downey caused Ms. Owen to be "very uncomfortable, terrified and intimidated by him." She added that this was due to

the fact that she was still dealing with a “lot of things” following the traumatic experience of being abducted in May, 2009.

[13] On cross examination, Ms. Owen confirmed that on the two occasions when Mr. Downey ordered at the passenger side drive-through where she worked, there was “just normal transaction conversation and that nothing was out of the ordinary.” On June 27, 2011, Ms. Owen confirmed that she did not talk to Mr. Downey at all, and that when he came into the restaurant, she immediately went to the back office and called the police non-emergency number.

[14] Although Ms. Owen confirmed that she called the police after another incident on August 17, 2011, she did not provide any other details relating to Mr. Downey’s visit to the Tim Horton’s restaurant at 159 Main Street, Dartmouth, Nova Scotia on that occasion.

[15] Ms. Owen said, on cross examination, that she believed Mr. Downey knew that she worked at that Tim Horton’s location. She maintained that belief because she was under the impression that, following her phone call to the police on June

27, 2011, police officers would tell Mr. Downey that he was not to go to that Tim Horton's location because she worked there.

[16] Ms. Stephanie Leslie testified that she has worked with Chelsey Owen at the Tim Horton's drive-through restaurant since May 2011. She said that there was a day when a man came into the restaurant and Ms. Owen "ran out back" and was "freaking out." Ms. Leslie could not recall the date when this incident occurred, nor could she recall any other details other than that it was a male person, who came in the restaurant. At that time, Ms. Owen and Ms. Leslie were serving their customers on the passenger side drive-through as well as the people in the restaurant.

[17] Shortly after that man walked in, Ms. Leslie noticed that Ms. Owen had gone to the back of the restaurant, leaving her to serve customers in the drive-through window and in the restaurant, by herself. She did not know why Ms. Owen left the front of the restaurant. She served that man, which took about 5 to 10 minutes. Ms. Owen did not return to the front of the restaurant while she served him. After that, Ms. Leslie saw the same man standing outside, on the restaurant's property, for about another 5 to 10 minutes.

[18] Ms. Leslie stated that Ms. Owen was really “upset” and “mostly scared” while she was hiding and crying in the back office. She believes that the male customer would have seen Ms. Owen run to the back, as the man was almost at the counter when Ms. Owen left the front counter.

[19] On cross examination, Ms. Leslie confirmed that the Tim Horton’s location at 159 Main Street is a small restaurant, with no seating inside, but it has two drive-through lanes, one for the drivers-side and the other for passenger-side deliveries. She also confirmed that she did not see any interaction between the man and Ms. Owen, and that while he was inside the restaurant, it did not look like the man was staring to get a look at where Ms. Owen had gone.

[20] Ms. Michelle Cooper, the manager at the Tim Horton’s location at 159 Main Street in Dartmouth, during the summer of 2011, confirmed that Ms. Owen was an employee at that location and that she had worked with her on June 27, 2011. She recalled an incident on that day where Ms. Owen left the work area at the front of the restaurant, ran to the back and locked herself in the office for approximately 10 minutes. Ms. Cooper stated that Ms. Owen was “crying, upset and afraid in the

office." Ms. Cooper helped Ms. Owen place a call to the police and obtained some security video surveillance for June 27, 2011, which she turned over to the police.

[21] Constable Donald Buell of the Halifax Regional Police responded to the call made by Ms. Owen. He met with the manager, Michelle Cooper, and looked at the video surveillance of June 27, 2011 for the period of time when the man described by Ms. Owen was inside or around the restaurant. The man who entered the restaurant, at about 7:47 AM on June 27, 2011, was later identified by the police through a photo lineup as being Mr. Rodan Downey. The Defence does not take issue with the identification of Mr. Downey as the person who entered the restaurant on that date and time.

[22] Constable Buell confirmed that he had received the video surveillance from the Tim Horton's location at 159 Main Street from the manager. At that restaurant, there are six surveillance cameras which monitor the ordering locations of both drive-through lanes, both delivery windows, the inside of the restaurant from the front door to the counter and the left and right turn exit lanes onto Main Street.

[23] From camera location number four, there is a view of the front windows of the store, the entrance door and the area in front of the service counter and display case. As the Tim Horton's employees indicated, the space in front of the counter is quite limited and there are no seats or tables. When the person identified as Mr. Downey entered the restaurant, Constable Buell stated that it appears that Mr. Downey is speaking on a cell phone being held in his right hand. The police officer also pointed out that Mr. Downey was under conditions in his Recognizance not to possess or use a cell phone.

[24] Constable Buell also stated that Mr. Downey paces back and forth from the counter towards the front entrance door, looks through the windows on the sides of the restaurant and back out towards Main Street prior to placing his order. Mr. Downey's order is placed at about 7:51 AM and a few moments later, the video surveillance shows Mr. Downey putting a cell phone down on the counter when he pays for his order. Mr. Downey leaves the restaurant with his order around 7:52 AM, turns left, walks toward the entrance lane off Main Street and then out of the view of that surveillance camera.

[25] Constable Buell added that Mr. Downey remained in the area of Tim Horton's restaurant and that, at about 7:55 AM, the security camera inside the restaurant shows Mr. Downey walking on restaurant property in front of the building towards the exit lanes to Main Street. About 30 seconds later, the video surveillance shows Mr. Downey walking beside the driver-side, drive-through lane and around 7:56 AM, he appears to speak with a person in a silver or gray car, for a few moments. Then, Mr. Downey walks behind the Tim Horton's restaurant and a few seconds later, at approximately 7:57 AM, he crosses the passenger-side drive-through lane and then walks towards the entrance off Main Street. Finally, the surveillance video shows Mr. Downey walking on the city sidewalk next to Main Street and, at 7:57:33 AM, he gets into the silver or gray car driven by another individual, and leaves the area.

[26] On cross examination, Constable Buell confirmed that there are a couple of parking spaces next to the entrance lane and that vehicles may enter this Tim Horton's location from either Main Street which is in front of the building or from Lakecrest Drive which is behind the building. The police officer agreed with Defence counsel that at no time after Mr. Downey walked out of the restaurant is he seen to be looking back towards the windows of the restaurant. The officer also

agreed that the way in which Mr. Downey was looking around, would be consistent with looking for someone to pick him up.

[27] Constable Buell also confirmed that, after responding to the call from Ms. Owen on June 27, 2011, he did not contact Mr. Downey to advise him to stay away from that Tim Horton's location or to stay away from Ms. Owen. In addition, he also confirmed that he was not aware that any other police officer who was involved in this investigation, had contacted Mr. Downey to advise him to stay away from that Tim Horton's location and from Ms. Owen.

[28] Constable Chris Tracy of the Halifax Regional Police Department said that he was dispatched to a call made by Ms. Owen on August 17, 2011 at about 10:30 AM. The officer was informed that Mr. Downey had just been in the Tim Horton's restaurant at 159 Main Street in Dartmouth and that he was under a court order not to have any direct or indirect contact with Ms. Owen. A short time later, Constable Tracy saw a person on Caledonia Street wearing clothing which matched the description provided by Ms. Owen. During a short conversation between Mr. Downey and Constable Tracy, which Defence counsel acknowledged was made freely and voluntarily, Mr. Downey confirmed his identity, that he was with his

girlfriend, Katrina Beals and that he had just come from the Tim Horton's at 159 Main Street in Dartmouth.

[29] Mr. Downey advised the police officer that he was on his way to a medical clinic to get a lump checked, but because the car of the person who was going to drive him, had a flat tire, he went to the Tim Horton's restaurant to get a juice. He left the restaurant after his girlfriend told him that she had seen someone on the phone and that she believed that the person was calling the police. Mr. Downey told the officer that he did not know Ms. Owen worked at that restaurant and that it was just "happenstance" that he was there at the same time as her.

[30] Following a CPIC check, Constable Tracy confirmed that Mr. Downey was subject to the terms of a Recognizance dated August 12, 2009, which ordered him not to have any direct or indirect contact or communication with Ms. Chelsey Owen. A copy of that Recognizance of Mr. Rodan Downey, supported by one surety (his mother, Ms. Anna Downey) was filed as exhibit. In that Recognizance, Mr. Downey was also ordered to remain in his residence at all times under terms of a house arrest, subject to certain exceptions for employment, medical emergency or medical appointment after advising the police, meetings with a

lawyer or probation officer, attending court or when he was in the immediate company of his surety between the hours of 8 AM and 6 PM.

ANALYSIS:

[31] Mr. Downey is charged with the criminal harassment of Ms. Chelsey Owen between June 1 and August 18, 2011 contrary to section 264(2)(c) of the **Criminal Code.** Sections 264(1) and 264 (2) provide as follows:

> 264(1) No person shall, without lawful authority and knowing that another person is harassed or recklessly as to whether the other person is harassed, engage in conduct referred to in subsection (2) that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them.
>
> 264(2) The conduct mentioned in subsection (1) consists of:
>
> > (a) repeatedly following from place to place the other person or anyone known to them;

(b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;

(c) besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be; or

(d) engaging in threatening conduct directed at the other person or any member of their family.

The Essential Elements of the Offence:

[32] Section 264(1) of the **Criminal Code** establishes the offence of "criminal harassment" [commonly referred to as "stalking"]. This provision came into force on August 1, 1993. In **R. v. Ryback**, 1996 CanLii 1833 (BCCA), leave to appeal refused [1996] 2 SCR x, Finch J.A. said at paragraph 47 that "the main purpose of the so-called "stalking" legislation was to enable the police to take timely action that would save women from being the victims of violence before it was too late." By its nature, a criminal harassment charge is often, not based upon a single incident, but rather, it is a cumulative offence which may include many forms of proscribed behavior over a period of time. Thus, when viewed in isolation, certain

forms of behavior might not amount to a criminal offence, but when the entire factual context is considered, their cumulative impact may amount to a criminal offence if all of the essential elements are established.

[33] In order to establish the *actus reus* for this offence, the Crown must prove each of the following four essential elements beyond a reasonable doubt: (1) that the accused voluntarily engaged in one or more of the forms of proscribed conduct set out in section 264(2)(a)(b)(c) or (d) of the **Criminal Code** without lawful authority; (2) that the complainant was harassed as a result of the accused's conduct; (3) that the conduct caused the complainant to fear for his or her safety; and (4) that the complainant's fear was, in all of the circumstances, reasonable. See **R. v. Sillipp**, 1997 ABCA 346 at paragraphs 18 and 32, leave to appeal refused [1998] SCCA No.3; **R. v. Kosikar**, [1999] O.J. No. 3569 (Ont. C.A.) at para. 19, leave to appeal refused [1999] SCCA No. 549.

[34] In order to establish the *mens rea* or the mental element for a charge of criminal harassment contrary to section 264 of the **Criminal Code,** the Crown must prove that the accused knew, or was reckless, or willfully blind as to whether the complainant was harassed by the proscribed conduct. The mental element of

this offence is the intention to engage in the prohibited conduct with knowledge, or with recklessness or with willful blindness that such conduct causes the victim to be harassed. Thus, the *mens rea* of the offence is the intention to engage in the prohibited conduct with the knowledge that the complainant is thereby harassed: see **Sillip**, *supra*, at para. 33 and **R. v. Cromwell**, 2008 NSCA 60 at para. 39.

Did the Accused voluntarily engage in one or more of the forms of conduct that are proscribed by section 264(2) of the Code?

[35] Looking at section 264(2) of the **Criminal Code**, I am satisfied that only one of the proscribed forms of conduct needs to be established by the Crown, as those forms of prohibited conduct are disjunctive. The Information alleges that Mr. Downey criminally harassed Ms. Owen between June 1, 2011 and August 18, 2011, by voluntarily engaging in watching or besetting her place of work, contrary to section 264(2)(c) of the **Code**. While the Crown Attorney's submissions focused on that particular form of proscribed conduct, I have also examined whether any of the other proscribed forms of conduct mentioned in subsection 264(2) of the **Code** were established by the evidence.

[36] After reviewing the totality of the evidence adduced in this case, I find that there is no evidence before me that Mr. Downey engaged in any repeated following of Ms. Owen contrary to section 264(2)(a) **Code**, nor is there any evidence that he engaged in any threatening conduct directed at her or any member of her family contrary to 264(2)(d) of the **Code**.

[37] In terms of section 264(2)(b) of the **Code**, courts have held that the phrase "repeatedly communicating with" requires communications of a direct or indirect manner to have occurred more than once. In **R. v. Ryback**, *supra*, at paras. 46-47, Mr. Justice Finch stated:

> "46...."Repeatedly" means conduct that is repeated on more than one occasion. Three communications would seem to be the minimum number sufficient to justify being described as "repeatedly."
>
> 47. I am of the view that counsel for the Crown is correct in his submission that the three specific incidents of communication must be viewed in their context to determine whether they constitute repeated communications for the purpose of section 264...Here, the

> appellant was a total stranger. The complainant knew nothing about him, while it appears that he had a considerable amount of information about her. He persistently and irrationally pursued the complainant over a two-year period, excepting the time when she was off on maternity leave. His behavior gave cause for alarm. A common sense approach would clearly indicate that in the circumstances of this case, three times should be construed as amounting to repeated communication. The police were justified in acting when they put a stop to it."

[38] In **R. v. Legere** (1995) 95 CCC (3rd) at 563-64 (Ont. CA), Laskin J.A. accepted the definition of "communicate" from the New Shorter Oxford English Dictionary (1993), which defined "communicate" as imparting or transmitting [something intangible or abstract such as motion, feeling, disease or heat or information or news], giving or bestowing [something material]; making or maintaining social contacts, conveying or exchanging information; succeeding in evoking understanding. Justice Laskin also noted that communicating can occur by acts or gestures as well as words.

[39] On all four occasions between June 1 and August 18, 2011 when Mr. Downey went to the Tim Horton's drive-through restaurant at 159 Main Street in Dartmouth, I find that the evidence established that the nature and context of the conversations between Mr. Downey and the Tim Horton's employees who served him were of a customary transactional nature for that restaurant. In fact, on the first two occasions in June, 2011, Mr. Downey was a passenger in a car that went through a drive-through lane. I find that there is no evidence that, in placing his order through the restaurant's intercom system, he knew or based on proven facts that I can reasonably infer that he ought to have known that he was speaking with Ms. Owen or that she would be delivering his order to him.

[40] Furthermore, on the last two occasions when Mr. Downey went into the Tim Horton's restaurant located at 159 Main Street, I find that those visits do not establish the proscribed conduct of "repeatedly communicating" with Ms. Owen under section 264(2)(b) of the **Code**. Ms. Owen's testimony was that she left the front counter area as soon as Mr. Downey entered the restaurant, and in these circumstances, I cannot find that he was repeatedly communicating with her in a direct manner. Furthermore, I find that the evidence also established that on these two occasions, Mr. Downey's conversations with other Tim Horton's employees at

that location were of a customary transactional nature for a Tim Horton's restaurant. As such, there is simply no basis upon which I could conclude that he "repeatedly communicated" in any indirect manner with Ms. Owen.

[41] In this case, the Crown submits that Mr. Downey's actions in going to the Tim Horton's restaurant on four occasions between June 1 and August 18, 2011, satisfied the essential element of voluntarily engaging in the proscribed conduct contrary to section 264(2)(c) of the **Code**. In order to establish this aspect of the *actus reus* beyond a reasonable doubt, the Crown would have to establish that Mr. Downey was either "watching or besetting" the place where Ms. Owen worked, resided or happened to be.

[42] The expression "watching or besetting" is not defined in the Criminal Code. In **R. v. Eltom**, 2010 ONSC 4001 (CanLii), a summary conviction appeal of a case which involved the interpretation of "watching or besetting"contrary to section 264(2)(c) of the **Code**, Justice Trotter said at paragraph 13:

> "The expression "watching or besetting" was defined in *Every Woman's Health Centers Society (1988) v. Bridges,* 1993 CanLii

1276 (BCSC); (1993), 109 DLR (4th) 345 (BCSC), a civil contempt case. After examining a number of dictionary definitions of these terms, Low J.held at para. 26:

These definitions lead to the conclusion that watching is passive in nature and besetting is active. *Watching is continually observing for a purpose* and besetting has a physical element of approaching and, with respect to another person, importuning or seeking to argue with that person. [emphasis added - in original text]

Importantly, as used in section 264 of the **Criminal Code**, the terms

> "watching" and "besetting" are disjunctive. Indeed, the information alleges that the appellant committed criminal harassment by merely watching the complainant. However, the juxtaposed words take meaning from each other. And as noted above, the legal meaning of "watch" requires continuous observation for a particular purpose: see *Telus Communications Inc. v. Telecommunications Workers Union*, 2005 ABQB 719 (CanLii); 385 AR 43 (QB) at paras. 58 to 59."

[43] As Justice Trotter pointed out in **Eltom**, *supra*, at paragraph 14, merely looking at someone and smiling, standing alone, is not sufficient to constitute "watching" within the meaning of section 264. The conduct must be viewed in its factual context and the provision must be applied with reference to the relationship between "watching" and "besetting."

[44] Based upon the definitions of "watching" and "besetting" utilized by Justice Trotter in **Eltom**, *supra*, I find that there is no evidence which would indicate that Mr. Downey watched or beset the place of work of Ms. Owen during the first two visits to the Tim Horton's restaurant in early June, 2011. As I have previously found, on these two occasions Mr. Downey was a passenger in a car and I am satisfied that the evidence established that he placed his order at the passenger-side drive-through intercom, picked up that order at the delivery window and then drove away. I find that the evidence established that there was no conversation with Ms. Owen at the delivery window and she confirmed that the order itself only involved the "normal transaction conversation" for a Tim Horton's drive-through and that "nothing was out of the ordinary."

[45] With respect to Mr. Downey's visit to the Tim Horton's restaurant on June 27, 2011, I find that the evidence established that Ms. Owen immediately left the front area of the restaurant as Mr. Downey was entering the building. Based upon Constable Buell's evidence and my own review of the security surveillance video, Mr. Downey walked into the building just after 7:47 AM. About 4 minutes later, at 7:51 AM, the receipt for Mr. Downey's transaction is printed (exhibit #1) and he leaves the restaurant with his order at 7:52 AM. During the time that Mr. Downey was in the restaurant, I find that the surveillance video showed him going back to the front door on a few occasions to look outside towards Main Street as well as looking outside to the left and right at the drive-through lanes, looking down at the display case and talking on his cell phone or checking it for messages.

[46] In addition, after reviewing the surveillance video of June 27, 2011 when Mr. Downey is in the restaurant, I find that on those occasions when he is facing towards the security camera, his attention is either directed down towards the product display case or at his server, Ms. Leslie. I find that the video surveillance does not show any attempt by Mr. Downey to look to the back of the building in an effort to potentially see where Ms. Owen had gone. On this point, I also note that Ms. Leslie's evidence is consistent with that video surveillance evidence.

[47] The surveillance video shows that Mr. Downey walks out of the Tim Horton's restaurant at approximately 7:52 AM, looks to his left and right, and then walks to the left and goes out of the view of the surveillance camera. For about 3 minutes, Mr. Downey is not seen by any of the surveillance cameras. There is no evidence as to where Mr. Downey went or what he did during this period of time, although Ms. Leslie said that the man remained outside the restaurant in the area for about 5 to 10 minutes.

[48] Shortly after 7:55 AM, the surveillance camera focused on the drive-through exit onto Main Street, shows Mr. Downey walking from the left to the right for about 10 seconds near the curb of the Tim Horton's property carrying the same tray that he had when he left the restaurant. The focus of his attention is primarily on Main Street, but there is a very brief glance back at the Tim Horton's building. Based upon my review of the video surveillance evidence, I find that this brief glance was less than one second in duration, and then Mr. Downey turns his attention back to Main Street. Ms. Owen had stated that she made brief eye contact with Mr. Downey. However, given the very brief nature of the glance, and the fact that I have no evidence as to whether a person standing outside the restaurant near the curb of the Tim Horton's property could see clearly into the building from that

distance, I find that this very brief glance back at the building does not constitute the continual or persistent "watching" for a purpose to establish a criminal harassment charge under section 264(2)(c) of the **Code.**

[49] At approximately 7:55 AM, Mr. Downey leaves the front of the building, and just before 7:56 AM, surveillance video shows him walking beside the driver-side, drive-through lane, still holding his order tray. After briefly speaking with the driver of a gray or silver colored car, Mr. Downey goes behind the restaurant, and at about 7:57 AM, he walks beside the drive-through entrance lanes towards Main Street. He returns to the front of the restaurant about 30 seconds later, walks along the city sidewalk and then gets into that gray or silver car and leaves the Tim Horton's property. After reviewing this video surveillance, I do not find that Mr. Downey made any attempt to look back at the building while he walked next to either of the drive-through lanes or while he was in front of the restaurant for the second time before leaving the area as a passenger in the gray or silver car, shortly after 7:57 AM.

[50] With respect to Mr. Downey's visit to the Tim Horton's restaurant on August 17, 2011, I find that there were very few details of this visit provided by

Ms. Owen other than the fact that she phoned the police after Mr. Downey left the restaurant. I find that Constable Tracy's evidence established that Ms. Owen had given the police a description of the clothing worn by Mr. Downey which the police officer used to subsequently stop Mr. Downey and have a talk with him. During that conversation with the police officer, which Defence Counsel conceded was made freely and voluntarily, Mr. Downey confirmed his identity and admitted that he and his girlfriend had just come from the Tim Horton's restaurant at 159 Main Street, in Dartmouth. Mr. Downey said that he had ordered a juice and left when his girlfriend told him that she believed someone was on the phone and calling the police. However, no other details relating to what, if anything, Mr. Downey said or did at the restaurant, on August 17, 2011, were related to the court. In these circumstances, I find that there is insufficient evidence with respect to Mr. Downey's visit to the Tim Horton's restaurant on August 17, 2011 to conclude that there were any actions or words which would constitute either "watching" or "besetting" in the context of a criminal harassment charge under section 264(2)(c) of the **Criminal Code**.

[51] Having made these findings of fact relating to each of Mr. Downey's four visits to the Tim Horton's restaurant between early June, 2011 and August 17,

2011, looking at the totality of those circumstances, I find that there is insufficient evidence for me to conclude that, during that period of time, he continually "watched" Ms. Owen for a purpose, such that it would constitute the proscribed conduct in section 264(2)(c) of the **Code**.

[52] With respect to whether Mr. Downey "beset" Ms. Owen during any or all of his four visits to the Tim Horton's restaurant, I adopt the definition of "beset" as utilized by Mr. Justice Trotter in **Eltom**, *supra*, which requires both a physical element of approaching and, with respect to another person, "importuning or seeking to argue with that person." According to **The Canadian Oxford Dictionary**, Oxford University Press Canada, 2001, the definition of "importune" is to 'solicit (a person) pressingly; to beg or demand insistently.' Looking at this definition, I find that the Crown would have to establish beyond a reasonable doubt that there was the physical approach coupled with some persistent communication to demand or beg for something or to seek to argue and thereby harass the other person.

[53] In terms of the facts which I have accepted in this case, I find that on June 27, 2011 and again on August 17, 2011, when Mr. Downey actually entered the

restaurant where Ms. Owen worked, in that general sense, it might be possible to consider that he "approached" her at her place of work. However, I find that in order to constitute the act of "besetting" someone, in addition to a physical approach of that other person, the Crown must also establish that there were some communications of a nature that are considered to be importune, argumentative or making demands insistently or persistently. I find that on both of those occasions, there was no evidence that there were any communications between Mr. Downey and Ms. Owen, let alone communications of a nature that would constitute "besetting" someone. For the same reasons, on the two earlier occasions in June, 2011 when Mr. Downey placed orders at the drive-through intercom, I have previously concluded that neither of those visits to the restaurant constituted the act of "besetting" Ms. Owen.

[54] In conclusion, I find that the Crown has not established beyond a reasonable doubt that Mr. Downey voluntarily engaged, between June 1 and August 18, 2011, in the proscribed form of conduct which constitutes an essential element of the *actus reus* of a criminal harassment charge, contrary to section 264(2)(c) of the **Code**. In addition, I have also found that the Crown did not establish beyond a reasonable doubt that Mr. Downey voluntarily engaged, between June 1, 2011 and

August 18, 2011, in any of the other forms of the proscribed conduct, contrary to section 264(2) of the **Code**.

[55] In view of my decision in relation to this essential element of the *actus reus*, I do not find it necessary to make any further comment on whether any of the other essential elements in relation to the *actus reus* were established by the Crown. As a result, I find that Mr. Downey is not guilty of the charge contrary to section 264(2)(c) of the **Code**.

Did the Crown establish the *actus reus* and *mens rea* of the breach of recognizance charges contrary to section 145(3) of the Code?

[56] In **R. v. Custance,** 2005 MBCA 23, leave to appeal refused (2005) 346 N.R. 195n (SCC), Steel J.A. , speaking for the Court, at paragraph 10, said:

> 10. The required elements of an offence under s.145(3) are:
>
> (1) that the Crown must prove that the accused was bound by an undertaking or recognizance;

> (2) that the accused committed an act which was prohibited by that undertaking or recognizance or that the accused failed to perform an act required to be performed by that undertaking or recognizance; and
>
> (3) that the accused had the appropriate *mens rea*, which is to say that the accused knowingly and voluntarily performed or failed to perform the act or omission which constitutes the *actus reus* of the offence.

[57] Madam Justice Steel also discussed the requisite *mens rea*, in **Custance**, *supra*, at paragraphs 12 and 13:

> 12. Gary T. Trotter, in his text *The Law of Bail in Canada*, 2nd edition (Toronto: Carswell, 1999) at 449, states that in order to have the requisite *mens rea*, the accused must knowingly or recklessly infringe the conditions of the undertaking. The Crown does not have to prove that the accused intended to breach the recognizance, but rather only that the accused intended to commit the *actus reus*. While recklessness (the conduct of one who sees the risk and nonetheless

> who takes the chance) will fulfill the *mens rea* requirement, mere carelessness or negligence will not. See **Sansregret v. The Queen**, [1985] 1 SCR 570 at 581 – 82, per McIntyre J. and **R. v. Legere** (1985), 95 CCC (3rd) 555 (Ont. CA) at 565.
>
> 13. The test for *mens rea* is primarily subjective, and in applying the subjective test, the Court looks to the accused's intention and the facts as the accused believed them to be. See **R. v. Theroux**, [1993] SCR 5.

[58] In terms of the *actus reus*, I find that the Crown has established that Mr. Downey was subject to and bound by the terms of the Recognizance entered into before a Judge on August 12, 2009. I find that Exhibit 3, a certified true copy of the Recognizance, establishes that the terms and conditions were read and explained to Mr. Downey by a Justice of the Peace. Furthermore, I find that Mr. Downey and his surety placed their initials beside each of the conditions in the Recognizance signifying that they acknowledged and understood those conditions.

[59] During his submissions, Defence Counsel conceded that Mr. Downey had violated the conditions in that Recognizance which prohibited him from using or having a cell phone in his possession and also required him to remain in his residence at all times under house arrest, unless one of the specific exceptions to that house arrest applied. Defence Counsel acknowledged that the onus was on Mr. Downey to establish that he had a lawful excuse to be away from his residence and that on June 27, 2011 and August 17, 2011, none of those exceptions to the house arrest condition were applicable. In relation to these three section 145(3) **Code** charges in the Information, I find Mr. Downey guilty as charged.

[60] For her part, the Crown Attorney acknowledged that if the court found that Mr. Downey was not guilty of the criminal harassment charge contrary to section 264 of the **Code**, then the two charges contrary to section 145(3) of the **Code** for failing to comply with the condition in the Recognizance to "keep the peace and be of good behavior" would be subject to the **Kienapple** rule against multiple convictions as they arise from the same transaction. I agree with the Crown's position with respect to the rule against multiple convictions. I find that there is a factual and legal nexus between the three section 145(3) **Code** charges which the Defence concedes were established beyond a reasonable doubt by the Crown and

the two charges for failing to keep the peace and be of good behavior. Therefore, in relation to the section 145(3) **Code** charges in the Information which alleged a failure to comply with the condition "to keep the peace and be of good behavior," on June 27, 2011 and on August 17, 2011, I order a conditional stay of those two charges in the Information.

[61] Having reached the previous conclusions, I must still determine whether the Crown established beyond a reasonable doubt the two charges under section 145(3) **Code** that Mr. Downey failed to comply with the condition in the Recognizance to "have no direct or indirect contact or communication with Angela Cohoon or Chelsey Owen, except through a lawyer" on June 27, 2011 and on August 17, 2011, The facts of the case raise the following issues:

> 1. Has the Crown established, beyond a reasonable doubt, the *actus reus* for this offence, *i.e*., that Mr. Downey did have direct or indirect contact or communication with Ms. Owen on those dates?
>
> 2. Has the Crown established the appropriate *mens rea* beyond a reasonable doubt, *i.e*. that Mr. Downey knowingly and voluntarily

committed the act or omission which constitutes the *actus reus* of the offence?

[62] As I stated previously in my analysis of whether any of the proscribed forms of conduct mentioned in section 264(2) of the **Code** were established, I concluded that Mr. Downey did not engage in any direct or indirect "communication" with Ms. Chelsey Owen on either June 27, 2011 or August 17, 2011. However, there still remains the issue of whether the Crown established the *actus reus* and *mens rea* in relation whether Mr. Downey did have direct or indirect "contact" with Ms. Owen on those two dates.

[63] In order to determine whether the Crown has established the *actus reus* in relation to the section 145(3) **Code** charges which alleged direct or indirect "contact" with Ms. Owen, it is first necessary to determine the meaning of "contact" in the context of the release conditions contained in the Recognizance. In cases, such as **R. v. Legere**, *supra*; **R. v. J.F**, [2001] O.J. No. 2054 (Ont. SCJ) per Hill J. ; and in **R. v. H.B.T,** 2004 NSSC 56 per Hall J., courts have adopted the dictionary definitions of "contact" to determine whether the actus reus was established.

[64] Hill J. of the Ontario Superior Court of Justice referred to a number of dictionary definitions in **R. v. J.F.**, *supra*, at paragraph 23 which defined "contact" as including "to bring or come into, or be in contact;" "a state or condition of touching" or "establishing of communication with someone, and observing or receiving of a significant signal from a person..." or "... to enter or be in contact with... get in communication with." After noting that the words "communication" and "contact" do not have the same meaning, Hill J. concluded at paragraph 24:

> "24. While there is clearly some overlap between the commonly understood interpretations of communicate and contact, neither is ambiguous or vague. Contact may, it seems to me, include intrusion into the privacy of another person, a disruption of individual security, for example by sending an item to an individual or acquiring physical proximity to another person in such a way for that presence to become known to the other person, even though in each example it may be said that there is no overt communicative aspect to the conduct."

[65] On the other hand, Hall J. of the Nova Scotia Supreme Court in **H.B.T**., *supra,* said at paragraph 19 that, in his view, the term "contact" signifies some interaction between the two individuals, in the sense that there must have been some communication between them. He accepted the dictionary definition of "communicate" to mean "to give, or to give and receive, information, signals, or messages in any way, as by talk, gestures, writings, etc."

[66] In **H.B.T**., *supra*, Hall J. noted the definition of the word "contact" adopted by Hill J. in **R. v. J.F.** *supra*, but he was not prepared to accept that definition in the context of the charge of a breach of probation for contact or attempted contact with another individual. Justice Hall stated at paragraph 22:

> "In my respectful opinion that is far too broad a definition. According to this definition, merely passing each other on the sidewalk, or being present in a restaurant, or a church, or on a bus, in view of each other would be considered contact, attracting penal consequences. The condition in question is analogous to a penal provision in a statute and it should be given a narrower interpretation, rather than such a broad interpretation."

[67] In my view, this difference of opinion with respect to the interpretation of "contact" can be resolved by having regard to the *mens rea* or mental element which must be established by the Crown beyond a reasonable doubt. In essence, I conclude that Hill, J. in the **J.F.** case is, in actuality, referring to those situations where the Crown has established that the "contact" was intentional or voluntary or reckless and without lawful excuse. On the other hand, I find that Hall J. in the **H.B.T**. case, through the examples that he had cited, is essentially referring to those situations where one would regard the "contact" as being accidental or incidental to the day-to-day activities of living in a community. In those situations, therefore, there would also have to be some evidence to determine whether the Crown had proven, beyond a reasonable doubt, the essential mental element of the offence, that is, that the accused had the intention of contacting the other person and did so knowingly and voluntarily or recklessly.

[68] With respect to the section 145(3) **Code** charge which alleges that Mr. Downey failed to comply with the condition to have no direct or indirect contact or communication with Ms. Owen on June 27, 2011, the Crown Attorney submits that this is an "unique" case. On that date, the Crown acknowledges that because

Ms. Owen immediately left the front area of the restaurant as Mr. Downey walked in, there was no direct or indirect communication with her.

[69] However, it is the position of the Crown that when Mr. Downey voluntarily entered the restaurant where Ms. Owen worked on June 27, 2011, his action then constituted direct or indirect "contact." The Crown Attorney also noted that the Recognizance does not make any exception for incidental contact. She submits that Mr. Downey's actions in and around the Tim Horton's restaurant on June 27, 2011, must be viewed in the context of the totality of the evidence, that is, that Mr. Downey knows Ms. Owen, that she is a witness in an upcoming trial involving charges alleged against him, and that the Court can therefore infer his intention to contact her at the Tim Horton's restaurant where she worked and then delayed his order for several minutes with the intention of harassing her.

[70] In my earlier analysis of the criminal harassment charge contrary to section 264(2) of the **Code**, I found that there was no direct or indirect communication by Mr. Downey with Ms. Owen on June 27, 2011. I also found in relation to the analysis of whether Mr. Downey "beset" Ms. Owen, that even if I had found that he had voluntarily "approached" her at her place of work, I also concluded that the

other essential element of "besetting" her, that is, the communicative aspect had not been established by the Crown.

[71] With respect to the analysis of the *actus reus* for the section 145(3) **Code** charge, I am satisfied that Mr. Downey was in physical proximity to Ms. Owen at the Tim Horton's restaurant on June 27, 2011. Furthermore, I find that Ms. Owen saw that Mr. Downey was about to enter the restaurant on that date, and therefore, based upon her evasive action of leaving her workstation, I have no doubt that his presence became known to her. As a result, I am also satisfied that Mr. Downey's entrance into the Tim Horton's restaurant on that date constituted the *actus reus* as either being a direct "contact" or an attempt to make contact with Ms. Owen.

[72] However, in relation to Mr. Downey's visit to the Tim Horton's restaurant on August 17, 2011, I found that there were very few details provided by the witnesses. As a result, I find that there is insufficient evidence for me to conclude that the Crown had established the *actus reus* relating to either communication or contact beyond a reasonable doubt , on August 17, 2011. In particular, there was no evidence presented in court to indicate whether Mr. Downey had actually entered into the restaurant, nor was there evidence relating to what, if anything, he

may have said to Ms. Owen or any other employee at the restaurant. Furthermore, I found that there was no evidence with respect to any actions, gestures or signs, etc. that may have been made or done while he was in or around the restaurant.

[73] In terms of whether the Crown established the appropriate *mens rea* beyond a reasonable doubt, in relation to Mr. Downey's visits to the Tim Horton's restaurant on June 27, 2011 and on August 17, 2011, after carefully considering the totality of the evidence, I find that there is insufficient evidence to conclude that Mr. Downey knowingly and voluntarily or recklessly came into contact with Ms. Owen or attempted to do so on those dates contrary to section 145(3) of the **Code.** I have reached that conclusion for the following reasons:

(1) There was no evidence that Mr. Downey and Ms. Owen had any other relationship between them or that they knew each other before June, 2011, except for the allegations relating to the substantive charges for which he was released under the terms of the Recognizance on August 12, 2009;

(2) There has been no final determination with respect to the substantive charges mentioned in the Recognizance of August 12, 2009. Those allegations

remain before the court and the trial is expected to be held at a later date. As such, Mr. Downey is presumed to be innocent in relation to those substantive charges. As a result, I cannot conclude from those unproven allegations which remain before the court that they equate to proven facts from which I could infer that Mr. Downey actually knows Ms. Chelsey Owen.

(3) Ms. Owen stated that she knew who Mr. Downey was because she had been in court when he appeared in relation to the substantive charges which are alleged to have occurred between May 10 and May 15, 2009. Given the fact that Ms. Owen had been in the public seating area of the courtroom when Mr. Downey had appeared in court on those occasions, the Crown Attorney submitted that I could assume that Mr. Downey had looked into the public seating area and that I could therefore infer that he knew Ms. Owen and that he was under conditions not to have any direct or indirect contact with her. On this point, there are no proven facts before me from which I could infer that Mr. Downey knew who Ms. Owen was, solely as a result of him having the opportunity to look at her in the public gallery at the back of the courtroom. Without proven facts from which I could infer that Mr. Downey knew Ms. Owen by name and by her appearance, I find that it would be inappropriate to draw that inference as it would be based upon

speculation and conjecture. In these circumstances, I am not prepared to infer that Mr. Downey knew Ms. Owen.

(4) There is no evidence before me that Mr. Downey knew that Ms. Owen worked at the Tim Horton's restaurant at 159 Main Street in Dartmouth. There is no nexus between that Tim Horton's restaurant and the substantive charges, and I have no proven facts before me from which I could infer that Mr. Downey knew or ought reasonably to have known that Ms. Owen was an employee of Tim Horton's restaurants and that she worked at its restaurant located at 159 Main Street in Dartmouth, Nova Scotia.

(5) Ms. Owen said that she believed, in June, 2011, that Mr. Downey knew where she worked because she understood that the police would be contacting Mr. Downey to tell him to stay away from the Tim Horton's restaurant at 159 Main Street, in Dartmouth. However, there was no evidence before the court that the police, prior to August 17,2011, had ever informed Mr. Downey that Ms. Owen worked at that Tim Horton's location or warned him that if he visited that location again he might be charged with an offence contrary to section 145(3) of the **Code**. Admittedly, this evidence would have assisted the Crown in establishing the

essential element of knowledge on the part of Mr. Downey. However, that evidence does not exist and therefore, I have no basis on proven facts to conclude that Mr. Downey knew that Ms. Owen worked at that Tim Horton's or that he intended to go there for the purpose of contacting her .

(6) In terms of Mr. Downey's actions in and around the Tim Horton's restaurant on June 27, 2011, the Crown submits that I should infer an intent to contact or harass Ms. Owen due to the fact that Mr. Downey was in the restaurant for approximately four minutes before leaving with his order. While that assertion may possibly be one inference which may be drawn from the proven facts, an equally plausible inference from those same facts is that Mr. Downey was waiting for another person to arrive and pick him up as evidenced by his numerous glances back outside the restaurant towards Main Street. Since I find that there is an equally plausible inference which may be drawn from the proven facts, I conclude that this evidence cannot be used by the Crown to establish that Mr. Downey had the requisite mental element of knowledge and intent to contact Ms. Owen.

(7) On the four occasions when Mr. Downey went to Tim Horton's restaurant at 159 Main Street, in Dartmouth, between June 1, 2011 and August 18,

2011, there is no evidence of any words, gestures, signals or signs having been made by Mr. Downey from which it might be inferred that he intended to contact or communicate with Ms. Owen. On the contrary, where there were proven facts established, the only things that were said during those visits to the restaurant were normal transactional conversations for a Tim Horton's restaurant and that nothing was said that was out of the ordinary. From these proven facts, an equally plausible inference is that Mr. Downey, like so many other people in this country, simply made a routine stop at a Tim Horton's location to order a coffee, doughnuts and other items to take away with him and that it was just a coincidence that Ms. Owen was at work there on those four occasions.

[74] As a result, I find that Mr. Downey is not guilty of the two section 145(3) **Code** charges which alleged that he failed to comply with the Recognizance by having direct or indirect contact or communication with Ms. Owen on June 27, 2011 and on August 17, 2011.